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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LESLIE LOWENFIELD,

Petitioner,

v.

HILTON BUTLER, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in this capital case, petitioner was denied his constitutional right to a fair and impartial jury trial by the trial court's insistence that the jury resolve its deadlocked status in the penalty phase, by forcing the jury to deliberate for an unreasonably lengthy period of time, by polling the jury, and by use of coercive supplemental instructions encouraging a verdict?

2. Whether the sentencing scheme by which petitioner faces death, based on a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious executions?

3. Whether, in this capital case, petitioner was denied his constitutional right to the assistance of counsel by the trial court's denial of petitioner's and trial counsels' pretrial motions for substitution of counsel due to a fundamental and irreconcilable disagreement as to the defense to be presented?

4. Whether, in this capital case, petitioner was denied the constitutional right to the effective assistance of counsel due to trial counsel's failure to investigate and present available mitigating evidence that if presented to the sentencing jury would have resulted in a reasonable probability of a sentence of life imprisonment as opposed to the death penalty, as is presently before the Court in Burger v. Kemp, No. 86-5375 (cert. granted, 55 U.S.L.W. 3315 (1986), argued 55 U.S.L.W. 3694 (March 30, 1987))?

5. Whether petitioner was denied the constitutional due process right to a fair trial, by a state rule imposing on him the burden of proving incompetence to stand trial?

LIST OF PARTIES

Petitioner is Leslie Lowenfield, an indigent prisoner incarcerated in Louisiana State Penitentiary at Angola, Louisiana, under a sentence of death. Respondent is Hilton Butler, the warden of that prison.

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IN THE
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LESLIE LOWENFIELD,

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v.

HILTON BUTLER, Warden,
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at Angola, Louisiana,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner Leslie Lowenfield respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on May 11, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, p. 33a, infra.

The memorandum decision of the United States District Court for the Eastern District of Louisiana (Beer, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 2254, the petitioner brought this habeas corpus petition in the Eastern District of Louisiana. On March 31, 1987, the Eastern District

denied petitioner's request for relief and his application for a certificate of probable cause.

Petitioner then sought a certificate of probable cause to appeal and a stay of his execution from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied his application on May 11, 1987.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on the Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Petitioner relies on the Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ., and to have the Assistance of Counsel for his defense.

Petitioner also relies on Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner further relies on certain provisions of the Louisiana Code:

> A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may nonetheless be destroyed by

> rebutting evidence; such is the presumption attaching to the regularity of judicial proceedings . . . that the defendant is sane and responsible for his actions. . . .

La. Rev. Stat. Ann. § 15:432 (West 1986).

> when the offender has a specific intent to kill or inflict great bodily harm upon more than one person.

La. Rev. Stat. Ann. § 14:30A.(3) (West 1986).

The Louisiana capital sentencing statute, upon which petitioner also relies, is reproduced in the appendix hereto, beginning at p. 34a.

STATEMENT OF THE CASE

Petitioner is a state prisoner under sentence of death who seeks review of the decisions denying him a writ of habeas corpus and a stay of execution. In May, 1984, petitioner was sentenced to death following convictions on three counts of first degree murder and two counts of manslaughter. Petitioner was found to have murdered his former girlfriend, members of her family, and another boyfriend of his girlfriend. Petitioner was convicted entirely on the basis of circumstantial evidence. The Louisiana Supreme Court affirmed the conviction and sentence. State v. Lowenfield, 495 So.2d 1245 (La. 1985).

After a death warrant was signed, petitioner sought state habeas corpus relief via new counsel. Relief was denied five days before his scheduled execution and petitioner filed a habeas petition with the Eastern District of Louisiana on November 17, 1986, two days before his scheduled execution. Following an evidentiary hearing, the trial court denied the petition on March 31, 1987. The Eastern District of Louisiana denied petitioner's motions for a stay of execution pending appeal and for a certificate of probable cause for appeal on April 30, 1987.

Having learned of the existence of a warrant for petitioner's execution for May 7, 1987, counsel immediately filed an appeal to the Fifth Circuit Court of Appeals on May 4, 1987, and that court scheduled argument for May 6, 1987. In the meantime, the state court trial judge granted a temporary stay until midnight on May 12, 1987, because counsel had not been properly informed and timely notified that a death warrant was signed. The Fifth Circuit treated the application for a stay of execution as an appeal on the merits, pursuant to Barefoot v. Estelle, 463 U.S. 880 (1983). In a lengthy opinion with one dissent, a

panel of the Fifth Circuit denied petitioner's application late in the afternoon of May 11, 1987.

Additional pertinent facts will be presented as they relate to petitioner's various claims.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was denied his right to a fair and impartial jury trial by the trial court's insistence that the jury resolve its deadlocked status in the penalty phase, by forcing the jury to deliberate for an unreasonably lengthy period of time, by polling the jury, and by the use of coercive supplemental instructions encouraging a verdict.

After deliberating for thirteen hours over the course of two days to reach a verdict of guilty, the jury, soon thereafter and over trial counsels' objections, sat through two hours of penalty phase arguments and was sent out again by the judge to arrive at the appropriate sentence. State of Louisiana v. Lovenfield, 495 So. 2d at 1258-59. By this time it was past 8:00 p.m. The jury deliberated for four hours that night and, near midnight, requested and was allowed to retire. Id. After more than two additional hours of deliberation the next morning, counsel for petitioner requested a mistrial because of the length of time the jury had been out. Id. This motion was denied and the jury continued to deliberate. Over three hours later -- a total of more than nine hours of deliberation on the sentencing phase alone and twenty-one hours altogether -- the foreman of the jury sent the judge a note stating that, "The jury is having great distress and is unable to reach a decision at this point. There is great imbalance in the voting. Please call us back in and direct the jury again as to its responsibilities . . . . Id. (emphasis added). Counsel for petitioners once again moved for a mistrial, which was denied. Id.

The trial court then polled the jury and found that four of the twelve jurors disagreed with the statement that "further deliberations would be helpful in obtaining a verdict." Id. After the jury expressed concern that they may have misunderstood the judge's inquiries, the judge again polled the jury, this time asking whether they felt that "any further deliberation will enable [them] to arrive at a verdict?" Id. One juror persisted in his or her view that additional deliberation would be unavailing. Id. Yet, the judge continued in his efforts to secure a unanimous verdict, and indicated that he would send the jury out for further deliberations. First, he charged them by stating:

> [I]t is your duty to consult with one another, to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment . . . . Do not hesitate to reexamine your own views and to change your opinion . . . .

Trial Transcript at 2351. The trial court further admonished the jury that their failure to reach a unanimous verdict would lead the court to impose the sentence of life imprisonment. Lowenfield v. Phelps, slip op. at 12 (E.D. La. March 31, 1987). Approximately thirty minutes later, the jury came back with a recommendation of death. Id., at 13.

The above-described record amounts to nothing short of an extraordinary trammeling of petitioner's Sixth Amendment rights to a fair and impartial jury trial. Through sheer persistence in keeping the jury deliberating for lengthy periods, the violation of the sanctity of jury deliberations, and coercive jury instructions, the trial court achieved a sentence of death. These practices merit this Court's careful review. Particularly troubling here are the fact that the trial judge essentially isolated a single hold-out juror through his polling technique and the fact that the ccerciveness of his actions were confirmed

by the rapid time period in which a sentence was thereafter rendered.

Many years ago this Court reviewed and approved a similar supplemental jury charge in Allen v. United States, 164 U.S. 492 (1896). Since that time, courts have recognized that other factors in addition to a jury charge may render jury deliberations fundamentally unfair and that courts must review the totality of the circumstances to assess the presence of coercion. The Sixth Circuit, for example, has not hesitated to find a violation of the Sixth and Fourteenth Amendments, on the totality of the circumstances on facts nearly identical to those in petitioner's case. Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), cert. denied, 411 U.S. 986 (1973).

Moreover, courts and the legal profession have significantly retreated from use of what has come to be known as the "Allen charge," even when considered apart from other circumstances. United States v. Rey, 811 F.2d 1453, 1458 (11th Cir. 1987). At least eighteen states have rejected its use, three federal circuit courts have prohibited Allen charges, and four other federal circuits have limited their use due to its unsalutary coercive effects on juries. Id. Nonetheless, this retreat from the Allen charge is not complete. In Rey, for example, while a panel of the Eleventh Circuit expressed its concern over the constitutional infirmities of such charges, it felt bound by a prior en banc decision of its predecessor court to uphold the practice there. Rey, supra, 811 F.2d at 1459. This result cannot be reconciled with the Sixth Circuit's decision in Norvell, supra, 472 F.2d 1185. The courts below failed to recognize these important developments in the analysis of jury coercion. It is crucial for this Court, both in its supervisory capacity and to resolve a split among the federal circuit courts, to address the significant development of this important issue.

This court expressed great concern over juror polling of the type used here in Brasfield v. United States, 272 U.S. 448. In Brasfield, the Court set up a per se rule against such practices. Justice Stone wrote:

> We deem it essential to the fair and impartial conduct of the trial that the inquiry [into the numerical division of the jury] itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division . . . . It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury . . . .

272 U.S. at 450.

While Brasfield has been uniformly interpreted by the federal circuits facing the question as being rooted in the Court's supervisory power rather than in the Constitution,[1] these courts also have recognized the importance of considering such intrusive practices as part of the totality of the circumstances of juror coercion properly subject to review.[2] The courts below totally failed to assess this factor, alone or in combination with the other overwhelming indicia of coercion in this case.

Moreover, the trial court's practices which are here being challenged -- concerning timing of the jury deliberations, violation of jury sanctity, and coercive supplemental instructions -- take on particular poignance because they arise in the context of a capital penalty phase proceeding. As discussed in Part I, supra, this Court has repeatedly insisted that the cap-

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1 Locks v. Sumner, 703 F.2d 403 (9th Cir.), cert. denied, 464 U.S. 933 (1983); United States ex. rel. Kirk v. Director, Department of Corrections, 678 F.2d 723 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044 (8th Cir.), cert. denied, 449 U.S. 1126 (1981); Ellis v. Read, 596 F.2d 1195 (4th Cir.), cert. denied, 444 U.S. 973 (1979).

2 Locks, 703 F.2d at 406; Kirk, 678 F.2d at 727; Cornell, 628 F.2d at 1048.

ital sentencing determination be reliable enough to withstand a heightened level of scrutiny.[3] At least one court has recognized the special character of bifurcated sentencing proceedings and held that use of an Allen charge in that context is wholly impermissible. Patten v. State, 467 So. 2d 975 (Fla.), cert. denied, ____ U.S. ____, 106 S.Ct. 198 (1985); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). This important constitutional issue merits the Court's attention.

II.

The Fifth Circuit's decision upholding petitioner's death sentence, based on a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious executions and conflicts with the rule in another Circuit and the highest courts of several states.

All parties to this capital case concede that petitioner's death sentence rests upon a single statutory aggravating circumstance that merely repeats an element of the underlying offense. Petitioner's case presents a square conflict in the circuits and, indeed, highlights a sharp divergence of views among a number of state high courts as well.

In Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), the Eighth Circuit found unconstitutional the Arkansas capital sentencing scheme which provided an aggravating circumstance that merely repeated an element of the underlying crime. That court held, as petitioner argues here, that the Arkansas provision was constitutionally infirm because it failed "to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same

[3] See, e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983).

underlying capital crime," thereby running afoul of the Court's concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972). Collins, 754 F.2d at 264. State high courts have joined in this concern over "double-counting" of aggravating circumstances.[4]

In petitioner's case and others, the Fifth Circuit has declined to adopt the Eighth Circuit's view on the constitutional infirmities created by such a system. (Appendix at ____). See, e.g., Welcome v. Blackburn, 793 F.2d 672 (5th Cir.), cert. denied, 107 S.Ct. 9 (1986); Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 55 U.S.L.W. 3346 (U.S. May 4, 1987) (No. 86-5026).[5] Indeed, in petitioner's case, the Fifth Circuit remained unmoved by a failure to guide sentencer discretion far more severe than that confronted by the Collins court. In Collins, the Eighth Circuit overturned a death sentence based on three statutory aggravating circumstances when one such circumstance overlapped with the definition of the crime. Here, the definition of petitioner's crime is identical to the sole aggravating circumstance -- with nothing else supporting his sentence of death.

The bedrock principle upon which this Court's modern capital punishment doctrine is based is that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

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[4] See, e.g., Glidewell v. State, 663 P. 2d 738, 743 (Okla. Cr. 1983).

[5] Several states have joined in this view. See, e.g., State v. Williams, 490 N.E.2d 906 (Ohio 1986), cert. denied, ____ U.S. ____, 107 S. Ct. 1385 (1987); Bradley v. Alabama, 494 So.2d 772 (Ala. 1986), cert. denied, ____ U.S. ____, 107 S. Ct. 1385 (1987); Wiley v. Mississippi, 484 So. 2d 339 (Miss.), cert. denied, ____ U.S. ____, 107 S. Ct. 304 (1986).

Gregg v. Georgia, 427 U.S. 153, 189 (1976) (Opinion of Stewart, Powell, & Stevens, JJ.). Strict adherence to this doctrine of guided sentencer discretion is crucial due to the qualitative difference of death from all other punishments and the corresponding need for greater scrutiny of and certainty in a capital sentencing determination. See e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, & Stevens, JJ.).

The Louisiana capital sentencing scheme under which petitioner is sentenced to die runs squarely afoul of these constitutional requirements. Petitioner's sentence is based on a sole statutorily defined aggravating circumstance[6] -- "the offender knowingly created a risk of death or to inflict great bodily harm to more than one person."[7] This factor is duplicative of the definition of first degree murder of which petitioner was found guilty.[8] While Louisiana has a bifurcated procedure to determine guilt or innocence and then the appropriate sentence in capital cases, the sentencing jury is not required to find that aggravating factors outweigh mitigating ones to impose death, but need only find beyond a reasonable doubt that one statutory aggravating circumstance exists to recommend a sentence of death.[9] Here, due to the complete identity of the definition of the crime and the statutory aggravating factor, the jury need only have found petitioner guilty -- with-

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[6] While the jury also found the additional statutory aggravating factor that "the victim was a witness in a prosecution against the defendant," La. Code Crim. Proc. Ann. art. 905.4(b), the Louisiana Supreme Court on direct review found that the evidence was insufficient, as a matter of state law, to support this finding. State v. Lowenfield, 495 So. 2d 1245, 1256 (La. 1985).

[7] La. Code Crim. Proc. Ann. art. 905.4(d) (West 1986).

[8] La. Rev. Stat. Ann. § 14:30A.(3) (West 1986).

[9] La. Code Crim. Proc. Ann. art. 905.3 (West 1986).

out anything more -- to sentence him to death. This unbridled juror discretion permitted by the Louisiana statute is no different in operation than many of the pre-Furman statutes invalidated by the Court fifteen years ago.

This Court has explicitly recognized the crucial constitutional role served by statutorily delineated aggravating factors in appropriately limiting and guiding juror discretion. As the Court stated in Zant v. Stephens, 462 U.S. 862 (1983), to avoid the unconstitutional risk of arbitrary death sentencing:

> . . . an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

462 U.S. at 876. The Louisiana statutory aggravating circumstance here fails both these tests. By providing no sentencer guidance other than that already contained in the definition of first degree murder, the death-eligible class remains unconstitutionally broad and is not circumscribed by legislative definition and the jury is free to impose the death sentence on anyone found guilty of the underlying crime.

If petitioner were sentenced under an identical scheme in the Eighth Circuit, he would, at a minimum, receive a new sentencing proceeding. The chaotic state of the law created by the courts' divergence of views means that a prisoner convicted under such "double counting" -- which presents a surprisingly common incidence based on the number of reported cases raising this issue -- may face execution or be spared dependent solely upon the fortuity of the state in which his or her crime was committed. Such a situation in itself smacks of the arbitrariness the Court found so disquieting in Furman and cries out for resolution.

III.

Petitioner was denied his Sixth Amendment right to the assistance of counsel by the trial court's denial of petitioner's and trial counsels' pre-trial motions for substitution of counsel due to a fundamental and irreconcilable disagreement as to the defense to be presented.

The record reveals that petitioner and his counsel agreed on one significant point only: that petitioner should have new appointed counsel due to fundamental and irreconcilable disagreements as to the defense strategy to be presented. The relationship between client and counsel deteriorated to an impasse, with conviction and a sentence of death not a surprising conclusion in light of this history of distrust and recriminations.

Trial counsel believed the only plausible defense was insanity, whereas petitioner insisted that his counsel develop and present an alibi defense and refused to entertain any arguments in favor of insanity. On May 8, 1984, petitioner ordered his attorneys to withdraw his plea of not guilty by reason of insanity and also so informed the court. (Habeas Petition, ¶ 159.) Around the same time, petitioner's appointed trial counsel and petitioner separately moved to withdraw from their representation and to have new counsel appointed. Id. Counsel further informed the court that they had received written death threats, believed to be from petitioner, as well as accusations from petitioner that they had deceived petitioner in various respects. (Exhibit D to Habeas Petition.)

Under these extraordinary circumstances, it is beyond peradventure that trial counsel should have been replaced. The Sixth Amendment's guarantee to a criminal defendant of the assistance of counsel has long been recognized as a core feature of our jurisprudence. See, e.g., Powell v. Alabama, 287 U.S. 45, 68-69 (1932). As the Court has recognized, where the surrounding

circumstances made it so unlikely that any lawyer could provide effective assistance and the circumstances suggest a breakdown in the adversarial process, ineffectiveness is properly presumed without inquiry into counsel's actual performance at trial. United States v. Cronic, 466 U.S. 648, 661-62 (1984). Using similar standards, the Court has recognized that an actual conflict of interest constitutes the type of situation where prejudice and a Sixth Amendment violation are to be presumed. Cuyler v. Sullivan, 446 U.S. 335, 350-51 (1980).[10]

The circumstances in petitioner's case are much like those where a conflict of interest exist and the same rules should apply; counsel believed they were so constrained in their relationship with their client that they utterly failed to explore and present any mitigating evidence of mental impairment despite the obvious existence of such a factor and their personal knowledge of its existence and they further failed to discuss such a tactic with petitioner.[11] (Federal Habeas Transcript of February 16, 1987, at 4-6.) See, e.g., Government of Virgin Islands v. Zepp, 748 F.2d 125, 136, 139 (3rd Cir. 1984) (finding Sixth Amendment violation without showing of prejudice for actual conflict of interest resulting from a divergence with respect to "legal issue or to a course of action."); United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984) (same).

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[10] See Strickland v. Washington, 466 U.S. 668, 692 (1984) (justifying presumption in conflict cases by noting the difficulty of measuring the precise effect on the defense if representation corrupted by a breach of the duty of loyalty).

[11] The courts below erred in analogizing petitioner's claim to that in Morris v. Slappy, 461 U.S. 1 (1983). In Morris, the Court considered whether a "meaningful" relationship between attorney and client created a cognizable Sixth Amendment claim where the client's preferred appointed counsel was ill but the substitute counsel was fully prepared to go to trial on theories concurred in by the client. 461 U.S. at 6, 13. Here, petitioner and his counsel could only agree that they had irreconcilable and fundamental strategy differences and that counsel should withdraw.

The federal circuit courts have recognized that a court's refusal to replace appointed counsel after an irreconcilable difference of opinion with a client amounts to a Sixth Amendment denial. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). The Sixth Circuit has explicitly held that constitutional choice of counsel claims are not subject to the prejudice requirement enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984). Wilson v. Mintzes, 761 F.2d 275, 285 (6th Cir. 1985). This Court should explicitly affirm the important constitutional principle that choice of counsel issues are properly carved out from the prejudice requirement of Strickland due to the irrelevance of that standard to the appropriate inquiry as well as the identity of the analysis here and in a conflict of interest case.

IV.

Petitioner was denied the constitutional right to effective assistance of counsel due to trial counsel's failure to investigate and present available mitigating evidence that if presented to the sentencing jury would have resulted in a reasonable probability of a sentence of life imprisonment as opposed to the death penalty. Further, this issue is identical in all material respects to the claim raised in Burger v. Kemp, No. 86-5375, and petitioner's execution should, at a minimum, be stayed pending a decision in that case.

Louisiana law provides that a mental disease or defect impairing the capacity of the offender, at the time of the offense, to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law" is a mitigating circumstance. La. Code Crim. Proc. Ann. art. 905.5(e) (West 1986). The Louisiana death sentencing statute requires the jury to consider evidence of mitigating circumstances before imposing the death penalty. La. Code Crim. Proc. Ann. art. 905.3 (West 1986). Despite these unambiguous provisions, trial counsel for

petitioner presented virtually no evidence of mitigation at the sentencing phase and failed utterly to present any evidence of mental impairment.[12] In light of the substantial available evidence on the record of mental impairment and the likelihood that this evidence would have resulted in a reasonable probability of a sentence other than death, petitioner was denied his right to the constitutionally effective assistance of counsel as explicated in Strickland v. Washington, 466 U.S. 668 (1984).

Trial counsel were aware that one of the psychiatrists at petitioner's last sanity hearing testified that petitioner was insane and that the defendant was too paranoid to assist his attorneys. State v. Lowenfield, 495 So. 2d at 1251. The three other psychiatrists agreed that petitioner was "paranoid in the extreme" and "primitive," but found him competent to stand trial. Id. Counsel never secured an opinion or testimony from these or any other psychiatrists whether petitioner suffered from the less extreme problem of mental impairment at the time of the offense.

Counsel also failed to pursue the potentially significant fact, told to him by petitioner, that he sustained a serious head injury while residing in Canada. Indeed, medical records describing this injury were readily available and could have formed the basis for a neurological opinion on mental impairment. (Habeas Transcript at 106).

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[12] It is probable that counsels' failure is attributable to the intolerable relationship with their client resulting from the fundamental disagreements, lack of trust, and accusations described in Section III, supra. That this dispute had a major adverse impact on counsels' judgment is further evidenced by their failure to object to admission of the murder weapons, which were purportedly discovered by family members at the crime scene well after an extensive police investigation, and were introduced with an inadequate chain of custody. This information came to light at nearly the same time as counsel were dealing with their client more as an adversary. This explanation does not render these shortcomings any more constitutionally acceptable, however.

Trial counsel also were personally aware of petitioner's impaired mental state. They had received paranoid, bizarre and threatening letters from petitioner concerning the representation strategy and investigation. They also were aware that petitioner had written similarly strange letters to members of his and the victims' families. In light of these known facts, as well as counsels' failure to present any other significant mitigating evidence, it was professionally unreasonable for counsel not to have developed and presented mitigating evidence of mental impairment. See, e.g., Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 1292 (1987).

There is a reasonable probability that this mitigating evidence would have resulted in a sentence less than death. The jury only found a single supportable statutory aggravating circumstance on which its recommendation of death was based. The Fifth Circuit has recently recognized the potential force of mitigating evidence of mental impairment, remanding in light of the fact that a jury found only a single statutory aggravating circumstance supporting its recommendation of death. Wilson v. Butler, No. 86-3537, slip op. (5th Cir. March 24, 1987).

The courts below erred in not finding trial counsels' failure to investigate and forfeiture of mitigating evidence constitutionally ineffective and in failing to ascribe prejudice to this inadequate representation. This Court should review these practices as part of its supervisory powers and provide much needed guidance to the federal district and circuit courts.

The issues raised by petitioner's claim are in all material respects identical to those the Court now faces in Burger v. Kemp, No. 86-5375 (cert. granted, 55 U.S.L.W. 3315 (1986), argued 55 U.S.L.W. 3694 (March 30, 1987)). Both cases involve a total failure of counsel to investigate and present

known mitigating factors. This Court should, in the alternative, stay petitioner's execution until resolution of the issues in Burger v. Kemp.

V.

Petioner was denied the constitutional due process right to a fair trial by a state rule imposing on him the burden of proving incompetence to stand trial.

Louisiana law presumes a defendant's sanity. La. Rev. Stat. Ann. § 15:432 (West 1986). Petitioner therefore had the burden of establishing his incapacity. State v. Lowenfield, 495 So.2d at 1252. Petitioner contends that this allocation of the burden is violative of due process fairness requirements because it required him to bear the burden of assisting his counsel in the very manner hs is attempting to show that he cannot. See Illinois v. McCullum, 362 N.E.2d 307 (Ill. 1977). Once competence has been raised as a bona fide issue, the constitution requires the State to bear the burden of showing that a defendant is competent to stand trial.

In Pate v. Robinson, 383 U.S. 375 (1966), this Court established that the constitutional due process right to a fair trial mandates state procedures adequate to ensure that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Accord, Drope v. Missouri, 420 U.S. 162 (1975). This Court has never squarely addressed the question of whether the allocation of the burden of proof to prove incompetence falls within those constitutionally guaranteed

procedures.[13] Contrary to the courts below, at least one federal circuit has found that the due process clause is violated where a state procedure places the burden of proving incompetency on a defendant. United States Ex Rel. Bilyew v. Franzen, 686 F.2d 1238 (7th Cir. 1982). Cf., United States v. DiGilio, 538 F.2d 972, 933 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (due process prohibits allocation of burden of proof to defendant in federal prosecution); United States v. Makris, 535 F.2d 899 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977) (same).

The courts below erred in failing to recognize the constitutional infirmity in the Louisiana statute.[14] The Court should address this important and open constitutional question to resolve the differing interpretations by the federal circuit courts.

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[13] Two members of the Court have expressed the view that the Court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), requiring the prosecution to prove beyond a reasonable doubt the absence of a heat of passion defense when the issue is properly raised, does not conflict with the Court's holding, that there is no constitutional requirement that a State shoulder the burden of proving the sanity of a defendant, in Leland v. Oregon, 343 U.S. 790 (1952). 421 U.S. at 705 (opinion of Rehnquist, J. & Burger, C.J. concurring). This view was confirmed by the Court's dismissal of Rivera v. Delaware, 429 U.S. 877 (1976), a case which squarely presented the issue of the constitutionality of burdening a defendant with proving his insanity defense. See Patterson v. New York, 432 U.S. 197, 205 (1977). Nonetheless, that decision does not foreclose the issue here because the issue of competence is distinct from that of insanity under Louisiana law. State v. Bennett, 345 So.2d 1129 (La. 1977).

[14] The District Court also wrongly concluded that petitioner waived this issue by withdrawing his plea of not guilty by reason of insanity. Louisiana law is clear, however, that insanity and incompetence are quite separate legal concepts. State v. Bennett, 345 So.2d 1129 (La. 1977).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

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No. 86-____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LESLIE LOWENFIELD,

Petitioner,

v.

HILTON BUTLER, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that true and correct copies of Petitioner's Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served today by overnight courier, postage prepaid, to each of the following:

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Respectfully submitted,

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